

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JUSTIN H. PHAIR,	)	CASE NO. C05-0721-JLR-MAT
	)	
Petitioner,	)	
	)	
v.	)	REPORT AND RECOMMENDATION
	)	
ALICE PAYNE,	)	
	)	
Respondent.	)	
_____	)	

INTRODUCTION AND BACKGROUND

Petitioner Justin Phair, proceeding *pro se* in this 28 U.S.C. § 2254 petition, presents an ineffective assistance of counsel claim. (Dkt. 6.)<sup>1</sup> Respondent submitted an answer, arguing that the petition is time barred under 28 U.S.C. § 2244(d) and that petitioner failed to exhaust his now procedurally barred claim. (Dkt. 11.) Petitioner did not submit a reply.

On November 16, 2000, the Superior Court of Whatcom County sentenced petitioner to 180 months confinement following a guilty plea on charges of first degree assault and first degree

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<sup>1</sup> As noted by respondent, petitioner's argument that he exhausted state remedies does not constitute a separate ground for relief.

01 robbery. (Dkt. 14, Ex. 1.) Petitioner did not file a direct appeal of the judgment and sentence.  
02 However, while serving his sentence, petitioner, acting *pro se*, prepared a motion to withdraw his  
03 guilty plea. (*Id.*, Ex. 5 at 1.) He gave the motion to prison staff on November 15, 2001 and the  
04 Whatcom County Court clerk stamped the motion as filed on November 20, 2001. (*Id.*) The trial  
05 court declined to hear the motion, finding it untimely and not alleging grounds sufficient to support  
06 the motion. (*Id.*, Ex. 5 at 1-2.)

07 Petitioner appealed the trial court's ruling. The Washington Court of Appeals denied his  
08 appeal in an unpublished opinion, affirming the trial court's refusal to hear the motion on the basis  
09 that it was untimely. ( *Id.*, Ex. 5 at 4.) Petitioner submitted a petition for review in the  
10 Washington Supreme Court. (*Id.*, Ex. 8.) After deferring the petition pending the outcome of  
11 another case on review, the Washington Supreme Court denied review on April 6, 2004. ( *Id.*,  
12 Exs. 9 & 10.) The Washington Court of Appeals issued its mandate on April 20, 2004. (*Id.*, Ex.  
13 11.)

14 Petitioner submitted a habeas petition to this Court dated April 7, 2005. (Dkt. 1.) He now  
15 proceeds based on an amended petition, dated July 20, 2005. (Dkt. 6.)

#### 16 Statute of Limitations

17 Section 2254 contains a one-year statute of limitations:

18 (1) A 1-year period of limitation shall apply to an application for a writ of habeas  
19 corpus by a person in custody pursuant to the judgment of a State court. The  
limitation period shall run from the latest of-

20 (A) the date on which the judgment became final by the conclusion of direct  
review or the expiration of the time for seeking such review;

21 . . . .

22 28 U.S.C. § 2244(d)(1). Under § 2244(d)(1)(A), a judgment becomes final ninety (90) days after

01 entry of the highest state court's decision on direct review, which marks the expiration of the  
02 period for filing a petition for a writ of certiorari. *See Bowen v. Roe*, 188 F.3d 1157, 1159 (9th  
03 Cir. 1999). The limitation period is tolled for the "time during which a properly filed application  
04 for State post-conviction or other collateral review with respect to the pertinent judgment or claim  
05 is pending[.]" 28 U.S.C. § 2244(d)(2). State collateral review is considered "pending" and the  
06 limitation period tolled from the time the initial application for collateral review is filed until that  
07 application is disposed of by the highest state court; it "is not tolled from the time a final decision  
08 is issued on direct state appeal and the time the first state collateral challenge is filed because there  
09 is no case 'pending' during that interval." *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).

10 In this case, because petitioner did not file a direct appeal, his conviction became final  
11 thirty days after his November 16, 2000 sentencing, or December 16, 2000. *See* Washington Rule  
12 of Appellate Procedure 5.2(a). His one-year statute of limitations under 28 U.S.C. § 2244(d)(1)  
13 began to run the following day, on December 17, 2000, *see Corjasso v. Ayers*, 278 F.3d 874, 877  
14 (9th Cir. 2002), and expired one year later, on December 16, 2001.

15 As noted above, petitioner filed a motion to withdraw his guilty plea that was deemed  
16 untimely by the trial court and the Washington Court of Appeals. While a properly filed state  
17 court application for post-conviction relief tolls the statute of limitations, an untimely state court  
18 application for relief is not "properly filed" within the meaning of § 2244(d)(2). *Pace v.*  
19 *DiGuglielmo*, 125 S. Ct. 1807, 1810 (2005). Accordingly, petitioner's untimely motion to  
20 withdraw his guilty plea did not toll his federal statute of limitations, which expired more than  
21 three years prior to the filing of his current petition. Because the statute of limitations expired  
22 prior to the filing of petitioner's habeas petition, the petition is time barred under 28 U.S.C. §



01 *Henry*, 513 U.S. 364, 365-66 (1995)). “The mere similarity between a claim of state and federal  
02 error is insufficient to establish exhaustion.” *Id.* (citing *Duncan*, 513 U.S. at 366). “Moreover,  
03 general appeals to broad constitutional principles, such as due process, equal protection, and the  
04 right to a fair trial, are insufficient to establish exhaustion.” *Id.* (citing *Gray v. Netherland*, 518  
05 U.S. 152, 162-63 (1996)).

06 Pursuant to RCW 10.73.090, no petition or motion for collateral attack on a judgment and  
07 sentence in a criminal case may be filed more than a year after the judgment becomes final.  
08 Additionally, if the state court expressly declined to consider the merits of a claim based on an  
09 independent and adequate state procedural rule, or if an unexhausted claim would now be barred  
10 from consideration by the state court based on such a rule, a petitioner must demonstrate a  
11 fundamental miscarriage of justice, or cause, *i.e.* some external objective factor that prevented  
12 compliance with the procedural rule, and prejudice, *i.e.* that the claim has merit. *See Coleman v.*  
13 *Thompson*, 501 U.S. 722, 735 n.1, 749-50 (1991); *Harris v. Reed*, 489 U.S. 255, 263 (1989).

14 Here, although citing federal law applicable to his ineffective assistance of counsel claim  
15 in his brief to the Washington Court of Appeals, petitioner did not address this claim in his petition  
16 for review with the Washington Supreme Court. (*See* Dkt. 14, Exs. 6 & 8.) Because petitioner  
17 failed to timely present his federal claim to the Washington Supreme Court, he failed to properly  
18 exhaust his state remedies. Further, because it has been more than one year since petitioner’s  
19 conviction became final, and because petitioner fails to establish either cause or prejudice excusing  
20 his procedural default, petitioner’s claims are procedurally barred by RCW 10.73.090.

## 21 CONCLUSION

22 For the reasons described above, the Court agrees with respondent that this habeas petition

01 is time barred and petitioner's claim unexhausted and procedurally barred. As such, petitioner's  
02 habeas petition should be denied and this action dismissed. No evidentiary hearing is required as  
03 the record conclusively shows that petitioner is not entitled to relief. A proposed Order of  
04 Dismissal accompanies this Report and Recommendation.

05 DATED this 20th day of October, 2005.

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07 Mary Alice Theiler  
08 United States Magistrate Judge  
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